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No. 76-403

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT MAXWELL FENLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1976, and a petition for rehearing and suggestion of rehearing *en banc* were denied on August 20, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on September 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court complied with Rule 11, Fed. R. Crim. P., prior to accepting petitioner's plea of guilty.

2. Whether the district court abused its discretion in denying petitioner's motion to withdraw his plea of guilty.

STATEMENT

An indictment returned by a grand jury of the United States District Court for the Southern District of California in August 1975 charged petitioner with 19 counts of knowingly and willfully inducing the illegal entry of aliens into the United States, transporting such aliens within the United States, and harboring and concealing them from detection, in violation of 8 U.S.C. 1324(a)(2), (3), and (4), and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. On September 19, 1975, pursuant to a plea bargain whereby the remaining counts would be dismissed, petitioner pleaded guilty to count five of the indictment, which alleged that he willfully and knowingly encouraged and induced, and attempted to encourage and induce, the illegal entry of an alien into the United States, in violation of 8 U.S.C. 1324 (a)(4). Before accepting the plea, the district court explained to petitioner that by pleading guilty he would waive his right to trial by jury with the assistance of counsel, to confront and cross-examine witnesses and to summon witnesses in his own behalf, and his privilege against self-incrimination (Tr. 16-17).[1] The court also informed petitioner that the maximum penalty for the offense was five years' imprisonment and a fine of $2,000 (Tr. 17) and established that petitioner was pleading guilty not because of threats or promises but because he was guilty (Tr. 19).

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[1]"Tr." refers to the transcript of the guilty plea proceedings on September 19, 1975. "H. Tr." refers to the transcript of the December 3, 1975, evidentiary hearing on petitioner's motion to withdraw his plea.

The court then developed the factual basis for the plea by paraphrasing the charge (Tr. 20):

> This says that this count five of the indictment says that you knowingly encouraged and induced or attempted to encourage and induce Blanca Estella Ramos Farrel, an alien, to enter and reside within this country. Is that what you did?

The petitioner responded, "[y]es, your Honor," and proceeded to detail his knowing involvement in the illegal entry of Farrel into the country (Tr. 20-22). Finally, after petitioner's counsel stated that he believed that petitioner was pleading guilty voluntarily and with an understanding of the charge (Tr. 22-23), the court accepted the plea.

On November 17, 1975, the date that had been set for sentencing, petitioner filed a motion to withdraw his guilty plea. Following an evidentiary hearing on December 3, 1975, at which petitioner, his former counsel, and the probation officer testified, the court denied the motion, finding that the plea had been entered "freely and voluntarily and with a full and clear understanding of the nature of the consequences of * * * pleading guilty" and that the government would be prejudiced by withdrawal of the plea (H. Tr. 70-71). On the next day petitioner was sentenced to two years' imprisonment. The court of appeals affirmed in an unpublished order, holding that the district court had adequately complied with Rule 11, Fed. R. Crim. P., and did not abuse its discretion in refusing to permit withdrawal of the plea of guilty (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 16-18) that the district court did not comply with Rule 11, Fed. R. Crim. P., because the record fails to show that petitioner was

informed of and understood the nature of the crime to which he pleaded guilty. As outlined above, however, the court expressly stated that petitioner was charged in count five with knowingly inducing or attempting to induce Blanca Estella Ramos Farrel, an alien, to enter and reside in this country illegally. Petitioner's admission, under oath (Tr. 16), of the facts underlying that charge clearly demonstrated that he understood the nature of the crime and that he intentionally committed the offense.

Petitioner correctly notes that, at a separate morning session on the day of petitioner's guilty plea (Tr. 6)[2] and subsequent to reading the charge to petitioner and establishing a factual basis for the plea (Tr. 21), the trial judge expressed the substance of count five with imprecision. These statements, however, when read in the context of the complete Rule 11 proceeding, do not indicate that petitioner was misled as to the crime to which he was pleading guilty. Indeed, at the completion of the proceeding, petitioner's attorney expressly reaffirmed that petitioner was "pleading guilty freely and voluntarily and with a full and clear understanding of the nature of the charge against him and the consequences of his guilty plea" (Tr. 22-23). The district's court's fact finding to that effect, reached after a full evidentiary hearing, does not warrant further review.

2. Petitioner claims (Pet. 18-22) that there is a need for further clarification of the district court's duty when accepting a plea of guilty. But even if such additional

[2]At a proceeding held on the morning of September 19, 1975, the district court refused to accept petitioner's plea of guilty because of his misunderstanding of the terms of the plea bargain and the consequences of the plea (Tr. 8-12). After an adjournment, petitioner pleaded guilty on the afternoon of that day.

guidance were necessary, this case would be an inappropriate vehicle, since it was decided under a version of Rule 11 that is no longer in effect.[3] In *McCarthy* v. *United States*, 394 U.S. 459, 467-468, n. 20, this Court declined to establish any guidelines under the old version of Rule 11 other than those set forth in the Rule itself and indicated a preference for a case by case determination in which "[m]atters of reality, and not mere ritual, should be controlling." Here, as we have previously noted, the record leaves no doubt that petitioner's guilty plea was voluntary and was the product of his complete understanding of all material facts.[4]

3. Petitioner contends (Pet. 22-23) that his plea of guilty was not entered knowingly because he was not advised that the plea would waive his right to cross-examine the witnesses against him. Before accepting the plea, however, the court twice advised petitioner of his right to confront and cross-examine the government's witness (Tr. 4-5, 16-18) and that he would give up

[3]Effective December 1, 1975, Rule 11 has been amended to require a more detailed interrogation of a defendant who wishes to plead guilty.

[4]Relying primarily on *United States* v. *Jasper*, 481 F. 2d 976 (C.A. 3), petitioner contends that there is a conflict between the decision below and decisions of the Third Circuit in the standards applied to determine the adequacy of a Rule 11 inquiry into a defendant's understanding of the nature of the charges against him. In *Jasper*, however, the defendant pleaded guilty to three counts of violating separate subsections of 18 U.S.C. 2113, and the district court's inquiry into both the nature of the charges and the factual basis of the separate offenses was represented by a single question: "Are you pleading guilty because of your guilt, and for no other reason?" 481 F. 2d at 981. The extensive colloquy in this case stands in marked contrast to the "[r]outine questioning or a single response by the defendant that he understands the charge," which the court of appeals criticized in *Jasper* (481 F. 2d at 980).

these rights by pleading guilty. In view of this record, the court was not required to accept the testimony of petitioner and his former attorney that petitioner may have misunderstood the term "cross-examination" (H. Tr. 38-39). See *United States* v. *Webster*, 468 F. 2d 769 (C.A. 9); *United States* v. *Fernandez*, 428 F. 2d 578 (C.A. 2).[5]

[5]Although presentence motions under Rule 32(d), Fed. R. Crim. P., are viewed liberally (see, *e.g.*, *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9)), a defendant has no absolute right to withdraw a plea of guilty and bears the burden of showing that it would be "fair and just" to permit him to do so. See *Kercheval* v. *United States*, 274 U.S. 220, 224; *United States* v. *Lombardozzi*, 436 F. 2d 878 (C.A. 2), certiorari denied, 402 U.S. 908. Whether to allow withdrawal of a guilty plea is a question committed to the sound judgment of the district court, whose decision will not be reversed absent an abuse of discretion. *United States* v. *Barker*, 514 F. 2d 208 (C.A. D.C.), certiorari denied, 421 U.S. 1013; *United States* v. *Lombardozzi*, *supra*, 436 F. 2d at 881.

Petitioner has not offered any reasons sufficient to disturb the district court's findings that his plea was voluntary and that withdrawal of the plea would not be fair and just. In this regard, the court properly noted that withdrawal of petitioner's plea would seriously prejudice the government because its material witnesses, all of whom were aliens who had illegally entered the country, had been returned to Mexico following the plea (H. Tr. 71). See *United States* v. *Barker*, *supra*, 514 F. 2d at 222; *United States* v. *Vasquez-Velasco*, 471 F. 2d 294 (C.A. 9), certiorari denied, 411 U.S. 970.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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